LIBRARY
SUPREME COURT, U. S.

No. 73-501

FILED
NOV 21 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

PATRICK HENRY EARLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-501

PATRICK HENRY EARLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims he was denied due process because the jury heard evidence of his prior criminal activity.

Petitioner and co-defendant Wayne Porter were tried by a jury in the United States District Court for the District of Kansas in May 1972. Both were charged in a multi-count indictment with violating the Travel Act, 18 U.S.C. 1952, and the National Firearms Act, 26 U.S.C. 5801, *et seq.*, in connection with various acts of arson, and with conspiring to violate those statutes, 18 U.S.C. 371. During the course of the trial, Porter pleaded guilty to the conspiracy charge, and the two substantive counts in which he was named as a defendant were dismissed. Petitioner continued with the trial and was found guilty on eight of the eleven counts with which he was charged. He was sentenced to a total of 25 years' imprisonment. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that co-defendant Porter owned and operated several grocery stores in Wichita, Kansas. Three of these stores were located in a predominantly Negro section of the community. Porter, during a period of racial unrest in the area, hired petitioner to commit acts of arson against one of Porter's own stores and the stores of two of his competitors. Petitioner obtained the services of others either to commit or to assist him in the commission of the various acts of arson.

Petitioner contends that references to prior criminal acts of his made by witnesses at trial were highly prejudicial and constituted reversible error. Specifically, petitioner cites the testimony of Virginia McCool and Vicky Hendricks (Pet. App. A-12—A-26).

Petitioner's contention is without merit. As the court of appeals noted in its opinion (Pet. App. A-10), it was petitioner's counsel who, in a number of instances, brought out testimony of petitioner's prior criminal acts (Tr. 336-340, 350).[1] Other references to prior criminal acts of petitioner were elicited by counsel for the co-defendant, without objection by petitioner's counsel (Tr. 352). Evidence of other crimes admitted during testimony of witnesses does not generally constitute reversible error where not elicited by the government. *Ashton* v. *United States*, 324 F. 2d 399, 400 (C.A. D.C.).[2]

---

[1] "Tr." refers to the transcript of the trial, three volumes of which (including the testimony of witnesses McCool and Hendricks), are being lodged with the Clerk of this Court.

[2] Of the cases petitioner cites as in conflict with this principle (Pet. 4-9), all but three relate to testimony elicited by the prosecution. Of those three, one, *Osborne* v. *United States*, 351 F. 2d 111 (C.A. 8), deals with a grand jury transcript which went to the jury although it was not admitted into evidence and is clearly

The trial court correctly pointed out that petitioner's counsel invited the references to petitioner's past record (Tr. 359-360, 368, 369). Nevertheless, the court at least twice instructed the jury to disregard testimony concerning petitioner's prior criminal acts (Tr. 384, 657), and when improper questions were asked the court properly sustained petitioner's objections (Tr. 397-399). As the court of appeals found (Pet. App. A-6), the evidence against petitioner was ample, and there is no reason to believe the jury disregarded the court's admonition against considering the testimony of prior criminal acts in determining petitioner's guilt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

---

inapposite. The remaining two—*Maestas* v. *United States*, 341 F. 2d 493 (C.A. 10), and *Tallo* v. *United States*, 344 F. 2d 467 (C.A. 1)—deal with answers given on cross-examination of a government witness. Both emphasize that the responses, which disclosed the defendant's prior criminal record, were non-responsive and thus could not have been predicted. In contrast, the trial court correctly concluded here that petitioner's counsel had invited the references to petitioner's prior criminal activities (Tr. 336-340, 350, 359-360, 368, 369). The court of appeals apparently agreed, noting that much of the testimony was originally elicited by petitioner's counsel (Pet. App. A-10). The cases cited by petitioner also indicate that the trial judge has a wide discretion in determining whether curative instructions will be sufficient, or whether a mistrial is necessary.